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TEXAS COURT OF CRIMINAL APPEALS

No. PD-1096-19

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COURT OF CRIMINAL APPEALS
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Ex parte Christopher Rion

On Discretionary Review from the Fifth Court of Appeals
No. 05-19-00280-CR

On Appeal from Criminal District Court No. 5, Dallas County
No. WX18-90101

Rion's Appellant's Brief

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Oral argument is permitted

I. Identity of Parties, Counsel, and Judges

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Kirk Lechtenberger, attorney for Rion at trial and on discretionary review

Katherine Haywood, attorney for Rion at trial

State of Texas, Appellee

John Creuzot, Dallas County District Attorney

Faith Johnson, Dallas County District Attorney at trial

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Brian Higginbotham, Dallas County Assistant District Attorney

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Sable Taddesse, Dallas County Assistant District Attorney

Judge Carter Thompson, Crim. Dist. Ct. No. 5, Dallas Co.

Justice Bill Whitehill, Fifth Court of Appeals

Justice Bill Pederson, III, Fifth Court of Appeals

Justice Robbie Partida-Kipness, Fifth Court of Appeals

II. Table of Contents

III. Table of Authorities

Cases

Statutes

Rules

Constitutional Provisions

To the Honorable Judges of the Texas Court of Criminal Appeals:

Appellant Rion respectfully submits this Brief:

IV. Statement of the Case, Procedural History, and Jurisdiction

The State filed and was granted a petition for discretionary review that asks this Court review the *Memorandum Opinion* ("Opinion") and Judgment of the Court of Appeals in *Ex parte Rion*, No. 05-19-00280, 2019 Tex.App.-LEXIS 8318 (Tex.App.-Dallas Sep. 13, 2019) (mem. op., not designated for publication). The Court of Appeals reversed the Order of the trial court signed on February 1, 2019 (CR.706)[1] that denied Rion's *Pretrial Application for Writ of Habeas Corpus Seeking Relief from Double Jeopardy, and in the alternative, a Motion for Continuance* (CR.91-128) ("Application").

The cause number of the trial court writ-application proceedings is WX-90101. Rion will refer to the pending case (and writ-proceeding) by the trial cause number F15-72104 (CR.8) or "pending trial" and the case

[1] The Clerk's Record is cited as "CR.__" or "CR-Supp.__" The Reporter's Record from F15-71618 is included in the Clerk's Record (CR.131-661) is cited as it appears by volume (i.e., RR1-RR6 followed by the page number) and by its location in the Clerk's Record. The court reporter filed exhibits under State's Exhibit 4, cited as "SX-4.____."

against which the Application was filed by its cause number F15-71618 or "acquitted case." (CR.89).

On October 13, 2019, the State filed a Motion for Rehearing. It was denied on November 1, 2019.

On November 13, 2019, the State filed the PDR. It was granted on January 15, 2002. The State filed its brief on March 2, 2002. This Brief responds to the State's Brief.

V. Statement Regarding Oral Argument

Oral argument has been permitted.

VI. Grounds Presented

Response to the State's Ground for Review: The Court of Appeals was correct in holding that the trial court abused its discretion by denying the Application on the issue of whether the State may try Rion for Aggravated Assault under a theory that he was reckless. The issue of Rion's alleged recklessness is subject to collateral estoppel and the State is barred by double jeopardy from relitigating it in a future trial.

VII. Facts

In the pending case (F15-72104), Rion was indicted for Aggravated Assault with a deadly weapon

In the pending case (F15-72104), Rion was indicted for Aggravated Assault with a deadly weapon under Tex. Penal Code § 22.02(a)(2) (2015) (CR.8, 70). The indictment alleged that on or about August 1, 2015, in Dallas County, Rion intentionally, knowingly, and recklessly caused bodily injury to Claudia Loehr by operating a motor vehicle at a speed not reasonable or prudent for the conditions then-existing, failing to control the speed of the vehicle, failing to keep a clear lookout and control of the vehicle, and striking the vehicle occupied by Loehr. The indictment also alleged that Rion used the vehicle as a deadly weapon. (CR.8, 70).

The affidavit for the arrest warrant in the pending case for Aggravated Assault, F15-72104

The affidavit for the arrest warrant for the pending case (F15-72104) alleges that on August 1, 2015 at about 5:35 p.m., Rion was driving a black 2014 Dodge Challenger, license-plate DSH2143, eastbound on the 5400 block of Arapaho in Dallas at a high speed. (CR.9-11, 71-73). Loehr was operating a tan 2006 Toyota Highlander westbound on the 5500 block of Arapaho. Loehr stopped in the left-turn lane at the

red light that was displayed by the stop-and-go signal facing westbound at the intersection of Arapaho and Prestonwood. Rion failed to drive in a single lane of traffic and crossed over into the eastbound lane, causing the front of his Dodge to collide into the front of the Highlander. The impact caused the Highlander to travel backwards 200 feet across three lanes of traffic, stopping on the sidewalk in the 5500 block of Arapaho. (CR.71). Claudena Parnell was in the front passenger-seat of the Highlander. (CR.71). Parnell was taken to Medical Center of Plano, where she passed away several days later. (CR.71).

Except for the complainants and charged-offenses, the indictment in the acquitted-case (F15-71618) alleges the same facts as in the pending case (F15-72104)

Under Cause Number F15-71618 (acquitted-case), Rion was indicted for Manslaughter under Tex. Penal Code § 19.04 (2015) (CR.74). The indictment alleged that on or about August 1, 2015, in Dallas County, Rion recklessly caused the death of Parnell—who is identified in the indictment for F15-72104 as having passed away—by driving a motor vehicle at a speed not reasonable or prudent for the conditions then-existing, failing to control the speed of the vehicle, failing to keep a clear

lookout and control of the vehicle, and then striking the vehicle occupied by Parnell. The indictment also alleges that Rion used the vehicle as a deadly weapon.

Other than different complainants and charged-offenses of Manslaughter versus Aggravated Assault with a deadly weapon, the indictment (CR.74) and affidavit (CR.75-77) in F15-71618 (acquitted-case) describes the same facts as the indictment (CR.8) and affidavit CR.71-73) in F15-72104—this pending case. In the affidavit for this case, the witnesses are Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Loehr is a lay witness. (CR.71-73). In the affidavit for F15-71618 (acquitted-case), the same witnesses are listed: Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Loehr is a lay witness. (CR.75-77).

Other than a few differences, the affidavits for the two cases are identical. These same witnesses are listed in the *State's List of Potential Witnesses* filed in F15-71618 (CR.86-88).

Rion asked the State to consolidate the cases into one trial, but the State refused. Rion then filed a motion to consolidate the cases into one trial, but the trial court denied the motion

The State refused to agree to consolidate the cases, so on October 21, 2016 and March 3, 2017, Rion filed pretrial motions to consolidate F15-71618 (acquitted-case) and F15-72104 (this case), arguing (CR.78-84):

- Rion was charged with Manslaughter under F15-71618 (acquitted-case) and Aggravated Assault under F15-72104 (this case). Both arose out of the same event and during the same time. The allegations are intrinsic to each other—they are the same facts. Assertions in both cases are the same, i.e., the alleged actus reas leading to the car-accident that caused injuries to both persons are the same.

- Rion is probation-eligible on both cases, so the punishment would **not** vary.

- On or about September 21, 2016, trial counsel Kirk Lechtenberger asked the State to agree to try both cases in the same proceeding. The State informed Mr. Lechtenberger that only one case would be tried before a jury and that the other case would be "held back." Mr. Lechtenberger objected to this scheme.

- Judicial economy demands that the cases be tried in the same trial. There is **no** valid reason that the trial court cannot or should not hear both cases in the same trial.

- Trying the cases separately violates Rion's rights under the Due Process Clauses of the Fifth and Fourteenth Amendment and his rights against cruel and unusual punishment under the Eighth

Amendment.

On March 3, 2018, a hearing was held on Rion's motion. (CR145-154; RR2.4-13). After hearing arguments, the trial court denied the motion. (CR.47, 85, 154; RR2.13).

The jury trial for Manslaughter in F15-71618 (acquitted-case) began. Its facts are the same as in F15-72104 (this case) for Aggravated Assault with a deadly weapon. Rion was acquitted of Manslaughter

On April 24, 2018, the jury trial for Manslaughter in F15-71618 began. (CR.156). On April 26, 2018, the jury acquitted Rion of Manslaughter. (CR.89). The State's witnesses were Gregory Watkins, Jesse Cantu, John Loehr, Claudia Loehr, Sarah Hubbs, Douglas Johnson, William Cantwell, James Ketelas, Jill Urban, and Nathan Williams. (CR.156-481). These are the same witnesses listed in the affidavits for both cases. (CR.71-73, 75-77).

The facts adduced at trial were that on August 1, 2015 at about 5:30 p.m., an accident occurred on Arapaho and Prestonwood involving a Dodge driven by Rion and a 2006 Highlander driven by Loehr. (CR.164-172, 175-180, 183, 544-553, 557-558; RR3.9-17, 20-25, 28; RR6.SX1-SX7, SX10). Rion was **not** intoxicated, and **nobody** smelled an alcoholic

beverage on him. (CR.258-259, 270; RR3.103-104, 115).

Rion failed to drive in a single lane, jumped the median, crossed over into the eastbound lane, and collided into the front of the Highlander. (CR.176-180, 216-219, 237-241, 251-254, 557-558; RR3.21-25, 61-64, 82-86, 96-99; RR6.SX10). At impact, Rion was driving about 71 in a 40 mile-per-hour zone. (CR.191, 286-289, 600-630; RR3.36, 131-134; RR6.SX34).

The impact caused the Highlander to travel backwards about 200 feet. (CR.220, 238; RR3.65, 83). The impact caused non-life-threating injuries to Loehr and life-threatening injuries to Parnell, who was in the front passenger-seat. (CR.172-174, 204-209, 219-225, 240-241, 268, 293-308; RR3.17-18, 49-54, 64-70, 85-86, 113, 138-153). Four days later, Parnell passed away at a hospital. (CR.207, 232, 294, 308, 631-638; RR3.52, 77, 139, 153; RR6.SX-35).

After Rion was acquitted of Manslaughter in F15-71618, the State announced it was proceeding with a jury trial in F15-72104 for Aggravated Assault with a deadly weapon. Rion filed the Application

Rion alleged in the Application (CR.91-128) that he is entitled to relief under the Double Jeopardy Clause of the Fifth and Fourteenth

Amendments and its corollary doctrine of collateral estoppel, Tex. Const. Art. I, § 14, Tex. Const. Art. V, § 8, and Tex. Code Crim. Proc. Arts. 1.10, 11.01, 11.05, 11.08 and 11.23. Rion alleged that based on this law, he is unlawfully restrained of liberty by the Sheriff of Dallas County, being charged with Aggravated Assault with a deadly weapon under Tex. Penal Code § 22.02(a)(2) (2015). (CR.98).

The trial court denies the Application, signs the State's Proposed Findings of Fact and Conclusions of Law, and continues the trial for Aggravated Assault so that the issue can be resolved on appeal

The trial court denied the Application. (CR.706). The trial court granted Rion's motion to continue the pending trial for Aggravated Assault so that this issue could be resolved on appeal. (CR.708). The trial court signed the State's Proposed Findings of Fact and Conclusions of Law ("FFCL"). (CR-Supp.4-21).

VIII. Summary of the Arguments

Rion will argue that the Court of Appeals was correct in holding that the trial court abused its discretion by denying the Application on the issue of whether the State may try Rion for Aggravated Assault under a theory that he was reckless. The issue of Rion's alleged recklessness is subject to collateral estoppel and the State is barred by double jeopardy from relitigating it in a future trial. Rion will ask this Court to affirm the Opinion and Judgment of the Court of Appeals.

IX. Argument

Response to the State's Ground for Review: The Court of Appeals was correct in holding that the trial court abused its discretion by denying the Application on the issue of whether the State may try Rion for Aggravated Assault under a theory that he was reckless. The issue of Rion's alleged recklessness is subject to collateral estoppel and the State is barred by double jeopardy from relitigating it in a future trial

Introduction

Collateral estoppel applies in Texas criminal cases. The doctrine has long applied in civil cases. Its application in criminal cases is as important. As Justice Holmes observed *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." In other words, if collateral estoppel is used to protect one's wallet, it should apply to protect one's freedom. It is a constitutional guarantee under the Fifth and Fourteenth Amendments that protects "(defendants) who (have) been acquitted from having to 'run the gantlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 445-446 (1970); U.S. Const. Amend. V; U.S. Const. Amend. XIV.

The Court of Appeals corrected the trial court's error that allowed the State to take a "second shot" at Rion even though collateral estoppel

applies and he asked the State to consolidate the cases into one trial. When this request was denied, Rion asked the trial court to consolidate the cases, but was denied. The judgment of acquittal for Manslaughter was a general verdict. Collateral estoppel required the trial court to examine the Manslaughter trial record, consider the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than what Rion sought to foreclose from consideration, which is recklessness. A rational jury could **not** have so-grounded its verdict, so the trial court abused its discretion by denying the Application.

What the State is trying to do here should **not** be allowed. By asking for a "second shot" at Rion, the State wants to do what is forbidden by double jeopardy as described in *Ashe*, 397 U.S. at 447, which is to treat the first trial "...as no more than a dry run for the second prosecution":

> "No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial. But this is precisely what the constitutional guarantee forbids."

There are **no** issues of separate sovereigns. The burden of proof in both cases is beyond a reasonable doubt. Rion **never** allege that Manslaughter and Aggravated Assault with a deadly weapon have the same elements as though the *Blockburger* test applies. What Rion alleged is that: (1) relevant facts—including that Rion did **not** act recklessly—were "necessarily decided" in the Manslaughter trial; and (2) the "necessarily decided" facts form the essential element of recklessness in the pending trial for Aggravated Assault.

The trial court erred when it denied the Application. If the trial court considered the facts and the law of collateral estoppel at all, it did so with a hypertechnical approach rather than with "realism and rationality."

This appeal was properly before the Court of Appeals and is properly before this Court

The writ of habeas corpus is an extraordinary writ. *Ex parte Perry*, 483 S.W.3d 884, 895 (Tex.Crim.App. 2016). Its purpose is to obtain a speedy and effective adjudication of a defendant's right to liberation from illegal restraint. *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex.Crim.App. 2002). Pretrial habeas corpus is available to: (1) challenge the State's

power to restrain a defendant; (2) challenge the manner of pretrial restraint, like the denial or conditions of bail; and (3) raise issues that would bar prosecution or conviction, like double jeopardy. *Perry*, 483 S.W.3d at 895 ("Except when double jeopardy is involved, pretrial habeas is not available when the question presented, even if resolved in the defendant's favor, would not result in immediate release."); *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex.Crim.App. 2001) (same).

A challenge to the denial of a pretrial application for writ of habeas corpus based on double jeopardy is allowed on interlocutory appeal. *Abney v. United States*, 431 U.S. 651, 662-663 (1977) (An order on a pretrial motion to dismiss an indictment on double jeopardy grounds is immediately appealable); *Ex parte Robinson*, 641 S.W.2d 552, 554-555 (Tex.Crim.App. 1982) (same)

The standard of review for appeals of rulings on pretrial habeas corpus is abuse-of-discretion. If resolving the ultimate questions turn on applying legal standards, review is de novo.

An appellate court reviews the factual findings underlying a trial court's decision on a pretrial application for writ of habeas corpus in the light most favorable to the ruling, and absent an abuse of discretion,

upholds the ruling. *Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex.Crim.App. 2006); *Ex parte Peterson*, 117 S.W.3d 804, 819 (Tex.Crim.App. 2003) (same). An abuse of discretion occurs if the trial court acts "arbitrarily or unreasonably," "without reference to any guiding rules and principles," *see* *State v. Hill*, 499 S.W.3d 853, 865 (Tex.Crim.App. 2016), citing *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex.Crim.App. 1990), or the trial court's decision falls outside the "zone of reasonable disagreement." *Johnson v. State*, 490 S.W.3d 895, 908 (Tex.Crim.App. 2016).

An appellate court affords almost total deference to the trial court's determination of historical facts supported by the record, especially if the fact findings are based upon credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex.Crim.App. 1997); *Peterson*, 117 S.W.3d at 819 (same); *Ex parte Amezquita*, 223 S.W.3d 363, 367 (Tex.Crim.App. 2006) (same). Almost total deference is also afforded to the trial court's rulings on applications of law to fact questions if resolving those ultimate questions turns on evaluating credibility and demeanor. *Guzman*, 955 S.W.2d at 89. But if resolving the ultimate questions turn on applying

legal standards or mixed questions of law and fact that do **not** depend upon credibility and demeanor, review is de novo. *Guzman*, 955 S.W.2d at 89; *Peterson*, 117 S.W.3d at 819.

Double Jeopardy and collateral estoppel

Under the Double Jeopardy Clause of the Fifth Amendment, a defendant **cannot** be put in jeopardy of life or liberty twice for the same offense. U.S. Const. Amend. V; Tex. Const. Art. I, § 14; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Double jeopardy protects a defendant from multiple prosecutions in cases where no final determination of guilt or innocence was made but a mistrial was improperly declared, or the trial was terminated favorably for the defendant provided the defendant did **not** seek the mistrial or termination. *United States v. Scott*, 437 U.S. 82, 95-100 (1978) (Double jeopardy not applicable where trial court terminated proceedings favorably to the defendant because of preindictment delay since the defendant chose to seek a termination of the proceeding). Rion is also protected by Tex. Code Crim. Proc. Arts. 1.10 & 1.11 (2018), which

provide that no person shall be put in jeopardy of life or liberty twice for the same offense.

Collateral estoppel is part of Double Jeopardy, applicable to Texas through the Fourteenth Amendment. *Ashe*, 397 U.S. at 445; U.S. Const. Amend. V; U.S. Const. Amend. XIV. Double jeopardy protects against a subsequent prosecution for an offense for which the defendant has been acquitted, while collateral estoppel bars a subsequent prosecution if: (1) relevant facts were "necessarily decided" in first proceeding; and (2) those "necessarily decided" facts form an essential element of the accusation in the pending trial. *Ex parte Taylor*, 101 S.W.3d 434, 439-440 (Tex.Crim.App. 2002); *Reynolds v. State*, 4 S.W.3d 13, 19, 21 (Tex.Crim.App. 1999) (same); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex.Crim.App. 2007) (same); *Ex parte Watkins*, 73 S.W.3d 264, 268-269 (Tex.Crim.App. 2002) (same); *State v. Stevens*, 235 S.W.3d 736, 740 (Tex.Crim.App. 2007); *Ashe*, 397 U.S. at 443 (same); *Ex parte Lane*, 806 S.W.2d 336, 338 (Tex.App.-Fort Worth 1991). Collateral estoppel applies if the prior verdict was grounded upon an issue that the defendant seeks to foreclose from litigation and **not** whether there is a possibility that an

ultimate fact was determined adversely to the State. *Id.*; *see also* *Ladner v. State*, 780 S.W.2d 247, 250 (Tex.Crim.App. 1989) (collateral estoppel prohibits a subsequent prosecution if the matters to be relitigated dictated the previous acquittal and the factfinder could **not** rationally have based its verdict on an issue other than the issue the defendant seeks to foreclose).

Collateral estoppel should **not** be applied with a hypertechnical approach but rather with "realism and rationality." *Ashe*, 397 U.S. at 444; *Watkins*, 73 S.W.3d at 268 (Courts must review the entire trial record, pleadings, charge, and the arguments of the attorneys to determine "with realism and rationality" which facts the jury necessarily decided and whether the scope of its findings regarding specific historical facts bars relitigation of those same facts in a second criminal trial). If a judgment of acquittal was based upon a general verdict—the usual case—collateral estoppel requires a court to examine the record of a prior proceeding, considering the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the

defendant seeks to foreclose from consideration. *Ashe*, 397 U.S. at 444. This inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.*, *citing* *Sealfon v. United States*, 332 U.S. 575, 579 (1948). Any test more technically restrictive would "simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.* *See also* *Ex parte McNeil*, 223 S.W.3d 26, 29 (Tex.App.-Houston [1st Dist.] 2006) (discussion of how to apply collateral estoppel **not** with a hypertechnical approach) and *State v. Sauceda*, 980 S.W.2d 642, 647 (Tex.Crim.App. 1998) (same).

Jeopardy attached when the jury was empaneled and sworn

Double jeopardy may be invoked if it attaches, which occurs when the jury is empaneled and sworn. *Serfass v. United States*, 420 U.S. 377, 391-394 (1975); *Martinez v. Illinois*, 572 U.S. 833, 839-840 (2014); *Crist v. Bretz*, 437 U.S. 28, 37-38 (1978) (same); *State v. Proctor*, 841 S.W.2d 1, 4 (Tex.Crim.App. 1992) (same).

Collateral estoppel prohibits trial for the pending Aggravated Assault case because: (1) relevant facts—including that Rion did not act recklessly—were "necessarily decided" in the Manslaughter trial; and (2) the "necessarily decided" facts form the essential element of recklessness in the pending trial for Aggravated Assault. Further, *Ex parte Adams* does not apply here

In F15-72104 (this case), Rion is charged with Aggravated Assault with a deadly weapon under Tex. Penal Code § 22.02(a)(2) (2015). (CR.8). The indictment alleges that on or about August 1, 2015, in Dallas County, Rion intentionally, knowingly, and recklessly caused bodily injury to Claudia Loehr by operating a motor vehicle at a speed not reasonable or prudent for the conditions then-existing, failing to control the speed of the vehicle, failing to keep a clear lookout and control of the vehicle, and striking the vehicle occupied by Loehr. The indictment also alleged that Rion used the vehicle as a deadly weapon. (CR.8, 70).

Under Tex. Penal Code § 22.01(a)(1) (2015), a person commits Assault if he person intentionally, knowingly, or recklessly causes bodily injury to another. Aggravated Assault is Assault with an aggravating factor. Under Tex. Penal Code § 22.02(a)(2) (2015), a person commits Aggravated Assault with a deadly weapon if the person: (1) intentionally,

knowingly, or recklessly (2) causes bodily injury to another and (3) the person uses or exhibits a deadly weapon during the assault.

Under Tex. Penal Code § 19.04 (2015), a person commits Manslaughter if he: (1) recklessly (2) causes the death of an individual. Manslaughter is a result-oriented offense, so a defendant's culpable mental state must relate to the result of his conduct. *See* *Schroeder v. State*, 123 S.W.3d 398, 399-401 (Tex.Crim.App. 2003) (Discussion of the elements of Manslaughter).

Reckless conduct requires a person to consciously disregard a **substantial and unjustifiable risk** that certain circumstances exist, or the result will occur. Tex. Penal Code § 6.03(c) (2015) (emphasis added). This conscious disregarding must be of such a nature and degree that it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the person's standpoint. *Id*.; *Williams v. State*, 235 S.W.3d 742, 750-751 (Tex.Crim.App. 2007) (explaining recklessness); *Bowden v. State*, 166 S.W.3d 466, 473-478 (Tex.App.-Fort Worth 2005) [The defendant acted recklessly because leaving young children alone in a room at night with

a blocked window, a burning candle, and house that had no means of extinguishing a fire and had only one door was a gross deviation from the standard of care as provided by Tex. Penal Code § 6.03(c)]; *see* *Lewis v. State*, 529 S.W.2d 550, 553 (Tex.Crim.App. 1975) (Reckless conduct as involves conscious risk creation, meaning that the defendant is aware of the risk surrounding his conduct or the results of that conduct but consciously disregards that risk. At the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct). As explained by this Court in *Williams*, 235 S.W.3d at 752:

> "[a]t the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct...[m]ere lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be," do not suffice to constitute either culpable negligence or criminal recklessness. Recklessness requires the defendant to...foresee the risk involved and to consciously decide to ignore it."

Aggravated Assault and Manslaughter share one element: Aggravated Assault can be committed recklessly; while Manslaughter is committed only recklessly. If facts pertaining to the issue of recklessness are resolved at trial in a defendant's favor, then the State is collaterally estopped from relitigating the issue at a later trial if the trials arise from

the same facts. That is what occurred here: (1) relevant facts—including that Rion did **not** act recklessly—were "necessarily decided" in the Manslaughter trial; and (2) the "necessarily decided" facts form the essential element of recklessness in the pending trial for Aggravated Assault. *Taylor*, 101 S.W.3d at 439-440; *Reynolds*, 4 S.W.3d at 19, 21.

On October 9, 2019, this Court decided *Ex parte Adams*, 586 S.W.3d 1 (Tex.Crim.App. 2019). Based mostly on *Adams*, the State argues that collateral estoppel should **not** apply in this case. (State's Br. 19-22, 27). But as Rion explains below, facts are what matter in deciding whether collateral estoppel applies because again: (1) relevant facts must have been "necessarily decided" in first proceeding; and (2) those "necessarily decided" facts form an essential element of the accusation in the pending trial. The relevant facts "necessarily decided" in first trial in *Adams* did not form an essential element of the accusation in the pending trial.

In *Adams*, Graves saw Adams stab Justin several times in the back and stab Joe in the back. *Id*. at 2. Joe claimed that when Justin and Hisey argued, he tried to calm them. *Id*. Because Justin and Hisey would not stop, Joe told them to "get it over with," the two started fighting, and

Hisey was knocked down. *Id*. To allow Hisey to get up, Joe pushed Justin back. *Id*. Justin and Hisey began wrestling. *Id*. After Joe tried to pull Justin off Hisey, Joe felt hot liquid because he had been stabbed. Justin yelled that Adams had a knife and began wrestling with Adams. *Id*.

Justin was wrestling Hisey on the ground for about 30 seconds until Joe broke them up. *Id*. Justin was blindsided by a punch from Adams. Justin and Adams began fighting until Graves screamed that Adams had a knife. *Id*. Hisey was attacked by Justin and fell to the ground. Hisey covered his ears and face while Justin beat him on the head, knocking him unconscious. *Id*. at 2-3.

Per Adams, Hisey was laying on the ground and getting hit in the head by Justin. Adams attempted to break up the fight, but Joe intervened and said, "let them fight." *Id*. at 3 Referring to Hisey, Adams replied, "it's not a fight, he's out." *Id*. When Adams went towards Justin to pull him off Hisey, Joe hit Adams. *Id*. Adams panicked and pulled out his pocketknife. When Justin lunged towards him, Adams started swinging the pocketknife, but struck Joe, and Justin tackled Adams. Adams was punched so he swung and hit Justin with the pocketknife.

Adams said he was trying to protect himself and Hisey, who was down. With both Justin and Joe coming at him, Adams felt overwhelmed and was afraid that just as Justin would not stop hitting Hisey, Justin and Joe would not stop hitting Adams. *Id.*

Adams was charged in two cases with Aggravated Assault against Justin and Joe. *Id.* The Justin-case went to trial. *Id.* The jury charge contained instructions for on Aggravated Assault with a deadly weapon and Aggravated Assault causing serious bodily injury. It included defensive issues of the use of deadly force in defense of a third person. *Id.* The jury found Adams **not** guilty. *Id.*

The State proceeded with the Joe-case. *Id.* Adams filed a writ of habeas corpus based on collateral estoppel, arguing that the Joe-case involves the same issue that was decided in the first trial: whether Adams was justified in using force in defense of a third person. *Id.* at 3-4. The trial court denied the application, but the court of appeals reversed, finding that the prosecution for Aggravated Assault in the Joe-case was collaterally estopped. *Id.* at 4.

This State filed a PDR, asking this question: "When a defendant is acquitted on a defense of a third person theory after stabbing a person engaged in a fight with a friend, does the collateral estoppel component of the Double Jeopardy Clause as articulated in *Ashe v. Swenson* and this Court's opinions bar his subsequent prosecution for stabbing another person who was not fighting?" *Id*.

This Court answered that collateral estoppel does **not** the subsequent prosecution for stabbing another person who was **not** fighting. In the first trial—the Justin-case—the issue that was necessarily decided was the defensive issue related to **Justin**, **not** to Joe, who was **not** fighting. The jury instructions reflect that Adams was charged with Aggravated Assault with a deadly weapon and causing serious bodily injury. Paragraph one instructed the jury to find Adams "Not Guilty" if it found that the State did **not** prove Aggravated Assault with a deadly weapon. If the jury agreed that the State proved Aggravated Assault with a deadly weapon, the jury was to return a "Not Guilty" verdict if it found that the State failed to overcome the defensive theory. *Id*. at 6.

The application section relating to deadly force in defense of a third person instructed the jury, "[I]f you have found the state has proved the offense beyond a reasonable doubt, you must next decide whether the state has proved that the defendant's conduct was not justified by defense of another." *Id*. To decide the issue of defense of another, the jury was to determine whether the state has proved beyond a reasonable doubt one of the following elements: (1) Adams did **not** believe his conduct was immediately necessary to protect Hisey against Justin's use or attempted use of unlawful deadly force; or (2) Adams's belief was **not** reasonable; or (3) under the circumstances as Adams reasonably believed them to be, he would **not** have been permitted to use force or deadly force to protect himself against the unlawful force or unlawful deadly force with which Adams reasonably believed Justin was threatening Hisey. *Id*. If the jury found that the State failed to prove beyond a reasonable doubt any of elements 1, 2 or 3, the jury was to find Adams "Not Guilty" of aggravated assault as alleged in the first paragraph of the indictment. *Id*.

The jury was similarly instructed in paragraph two to find Adams "Not Guilty" if the State failed to prove aggravated assault causing

serious bodily injury, or if the State proved it, the jury found that the State failed to overcome the defense. *Id*. at 6-7. By its "Not Guilty" verdict, the jury determined that the State failed to prove Aggravated Assault or disprove the defense. *Id*. at 7. Thus, the "single rationally conceivable issue in dispute before the jury" was whether Adams acted reasonably to defend Hisey against Justin's attack. *Id*.

Adams did **not** contest whether Aggravated Assault was proven. *Id*. His voir dire discussed the defensive issue and the State's burden to disprove it. *Id*. Adams did **not** deny that there was an assault. *Id*. During closing argument, Adams stated there was an assault and focused on the defensive issue. *Id*. The question of whether Adams committed Aggravated Assault with a deadly weapon or causing serious bodily injury was **not** in dispute. *Id*. Adams testified that: (1) he was swinging his knife at Justin—there was evidence that Justin was stabbed but **no** evidence that someone else stabbed Justin; and (2) when he drew his knife, he was trying to protect himself and Hisey. *Id*.

Thus, Adams's intent may be inferred from the extent of Justin's injuries. *Id*. The evidence showed that Justin's injuries were

intentionally inflicted. *Id*. Thus, the jury could **not** have rationally found that Adams did **not** commit Aggravated Assault or that Justin was **not** the victim. *Id*. The evidence of Adams's aggravated assault against Justin and the defensive strategy of admitting assault—but justifying it to defend Hisey from Justin—means that the jury's "Not Guilty" verdict could have happened only because it accepted Adams's defense that he needed to protect Hisey. *Id*. at 8.

Thus, this Court found that Adams's acquittal was based on a defense specific to Justin and **not** whether Adams was justified in his use of force against Joe, who was **not** fighting Hisey. This issue was **not** necessarily decided by the jury in the first trial, so it is **not** subject to collateral estoppel. The jury's "Not Guilty" verdict acquitting Adams of aggravated assault against Justin was therefore **not** a final jury determination that Adams was justified in using force against Joe to defend Hisey. Consequently, this Court held that when a defendant is acquitted on a defense-of-a-third-person theory after stabbing a person engaged in a fight, collateral estoppel does **not** bar a subsequent prosecution for stabbing another person who was **not** fighting. *Id*. This

is because the relevant facts "necessarily decided" in first trial in *Adams* did **not** form an essential element of the accusation in the pending trial.

The facts of Rion's case that prompted the Court of Appeals to correctly conclude that collateral estoppel applies are materially different than the facts in *Adams*. The facts of Rion's case fall within collateral estoppel, which bars a subsequent prosecution if: (1) relevant facts were "necessarily decided" in the first proceeding; and (2) if such "necessarily-decided" facts form an essential element of the charge in the pending trial. *Taylor*, 101 S.W.3d at 439-440; *Murphy v. State*, 239 S.W.3d 791, 794 (Tex.Crim.App. 2007).

Rion's case is straightforward: Aggravated Assault may be committed intentionally, knowingly, or recklessly. *Rion*, *id.* at *24-25, *citing* Tex. Penal Code § 22.01(a)(1) (2015), & Tex. Penal Code § 22.02(a) (2015). The indictment in F15-72104 (pending case) alleges that Rion intentionally, knowingly, and recklessly caused bodily injury to Loehr using his motor vehicle, a deadly weapon. (CR.8). The Court of Appeals concluded that if the State "…pursues the pending case against Rion on a theory that he was reckless, then the precise issue raised, litigated, and

finally determined in Rion's favor in the (acquitted case)—that Rion was not reckless in driving 71 miles-per-hour, losing control of his vehicle, and causing a collision—would be an essential element of the offense in the second trial." *Rion, id.* at *25.

The jury charge submitted by the trial court in the acquitted case closely tracks the statutory definitions of the mens rea. *Rion, id.* at *16. And the State, despite its focus on the jury charge, ignores that Rion's trial counsel focused on the recklessness issue in detail in his closing argument as explained by the Court of Appeals. *Rion, id.* at *19-20. Trial counsel focused on the recklessness issue: whether Rion was aware of the risk but consciously disregarded that risk—with recklessness requiring that a person be aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur, which tracks Tex. Penal Code § 6.03(c) (2015). As trial counsel argued in relevant part during closing arguments (CR.501-509; RR5.23-28):

> "As I told you, I don't like lawyer language. But we have to talk about it. When you look at reckless—this this is page two of the Charge -- you look at it from the standpoint of the person charged. The standpoint of the person charged is not the State. It's not some of the other folks that are looking at you, some of the other prosecutors that are watching us, it's

from Mr. Rion's point of view. Was Mr. Rion actually aware of the risk? What evidence did you hear, any of you all, that he's ever had a break before; that he's aware of it; that he's had 20, 30 speeding tickets, red light tickets, he's not actually aware of anything and consciously disregards? Well, what does that mean?

. . . . .

What does that mean? That means that you have to be willful in your actions. Remember, we asked that same question when you were sitting on those hard benches. You have to be aware of it. There has to be some type of forewarning. There has to be some type of element beforehand, and that didn't happen. Again, as tragic as this is, it's simply not reckless. It's simply not an offense. Let's talk about what's not relevant. Apparently, in the world of Government and the world of the State, they somehow think that groceries mean guilt. They somehow think that racing stripes mean guilt. They somehow think that an air cannister -- which, of course, we don't have. They haven't tested it. There's no evidence, other than what the Defense has given you all -- that somehow that equates to guilt. Or ducktail with what the prosecutor said, that Mr. Rion may have had some type of speaker box. That equates to guilt.

Now in...the world of the State, the only way that works is if Chris is a faker. Or, let's call it what it is: Chris is a liar. Notwithstanding that since the age of nine years old, this has been documented, his mental health concerns. Irrebuttable, unrefutable and 100 percent accurate. Now, is that an excuse? Of course not. It's perspective. It's doubt. And you all know that, in your heart of hearts. You know that what I'm saying resonates with you. It makes sense. Although, you may not like being here. Certainly what I'm saying, what the Defense has brought forward to you, pro-actively -- we didn't have to

do anything. Nine out of ten times, as you all know, most lawyers will just lawyer up. But we felt that you all needed to hear this.

. . . . .

If Chris is a faker and Chris is a liar, then Roger, he must be a faker, he must be a liar. And then, of course, what I don't understand is that the State essentially is now calling the expert, a doctor, apparently a faker and a liar. And they have the audacity to get up here and somehow try to impinge Dr. Clayton.

. . . . .

The Charge is clear. There's absolutely no way, on page two, that you can get there. Can you go to beyond a reasonable doubt, please. If the State had such an issue with this case or if they had such an issue with my expert, here's a novel idea, State of Texas: You've only had two and-a-half years. Why don't you go hire your own expert. How about that, for a novel idea? If they disagree with Dr. Clayton, go hire your own expert. For two and-a-half years, they've had the opportunity to do something. There's no expert. They take umbrage about the records. Do you remember, when the prosecutor was talking to Mr. Rion about the records? Do you know where those records came from? The Defense. Four months ago, I gave them copies of these 33 pages of Mr. Rion's records...

. . . . .

Page three talks about intoxication. You don't have to look at it. Did you hear the word "intoxication" whatsoever, at any point in time, other than from the mouth of the Government? Do you think, in the world that we live in, with two critically-injured women in a car, that three police officers, the entire

Dallas Police Department, would let Mr. Rion go, after an hour of conversations with him, with tests? Do you think there would be any type of holding Mr. Rion back, if he was intoxicated? Of course not.

. . . . .

And then, on page four, the Government now, again, for the first time, and notwithstanding the indictment, now wants to split the difference with you. The obligations of the State -- the obligations of the State -- just like with our wonderfully-elected District Attorney, is to see that justice is done; not to seek a conviction, but to see that justice is done. And when you come in here two and-a-half years later and then try to suggest and surmise a guilty verdict, based on some type of lesser offense, that's just not fair. That's just not right.

. . . . .

But in no way shape or form has the Government, the State of Texas, gotten to the point of beyond a reasonable doubt to secure any type of conviction under anything.

. . . . .

Folks, let me conclude this way: Page eight, regrettably, you have three options. There should only be two. But, that comes from the State. I guess, after two and-a-half years, they want to try to split the difference. You all need to sign on the third option. I want to make it easy. Third option is not guilty.

. . . . .

This is a not guilty. You all know it, the Government knows it, we know it. Chris is not guilty.

Thus, it is clear from the evidence presented and trial counsel's closing arguments that the sole focus was that Rion was **not reckless**, and the jury agreed. Throughout the trial and closing arguments, trial counsel did **not** raise a separate ground for acquitting Rion, but merely buttressed the theory that Rion suffered a mental breakdown that rendered him **not** criminally liable for his conduct, and thus he could **not** have been reckless. *Rion*, *id.* at *11, 20; (CR.502-503, 509-519; RR5.21-22, 28-38). The trial court still charged the jury on the lesser-included offense of Criminally Negligent Homicide over trial counsel's objections, but the jury also rejected this option. *Rion*, *id*. at *8; (CR-Supp.10).

The jury charge also focused on the recklessness issue, first by defining how a person acts "recklessly" or is "reckless." (CR-Supp.3). The charge further instructed that "[F]or a person to be deemed 'reckless' there must actually be both a substantial and an unjustifiable risk that the result complained of will occur, and that the person acting was actually aware of such risk and consciously disregarded it." (CR-Supp.4).

Finally, the application paragraph asked the jury to find Rion guilty if the jury found that Rion recklessly caused Parnell's death "...by

operating a motor vehicle at a speed not reasonable or prudent for the conditions then existing or by failing to control the speed of said motor vehicle or by failing to keep a clear lookout or control of said motor vehicle, therefore striking the motor vehicle occupied by deceased." (CR-Supp.5-6).

The jury rejected the State's arguments that Rion was reckless in his actions and acquitted him. (CR-Supp.10). Clearly, the jury found in Rion's favor on all relevant facts about recklessness and made a final judicial determination. The State is **not** entitled to move against Rion on Aggravated Assault on a theory of recklessness. And it is implausible that any jury would find that Rion acted intentionally or knowingly.

When this Court considers "with realism and rationality" the trial record, pleadings, charge, and arguments of the State and defense, it should conclude that the jury necessarily found on the fact of recklessness in Rion's favor, so this issue **cannot** be litigated again in a second trial. *Rion, id.* at *14; *citing* *Ashe*, 397 U.S. at 445, *Taylor*, 101 S.W.3d at 441-442, and *Watkins*, 73 S.W.3d at 268-269. This is **not** the disfavored "hypertechnical approach" but a straightforward consideration of the

facts that were "necessarily decided" in F15-71618—**no** recklessness—that form an essential element of the pending trial for Aggravated Assault—also **no** recklessness:

Both cases arise out of the same event—the car accident—and the same instant, which was on August 1, 2015 at about 5:30 p.m. (CR.164-172, 175-180, 183, 544-553, 557-558; RR3.9-17, 20-25, 28; RR6.SX1-SX7, SX10). Rion failed to drive in a single lane of traffic, crossed over into the eastbound lane, jumped the median, and collided into the front of the Highlander (CR.176-180, 216-219, 237-241, 251-254, 557-558; RR3.21-25, 61-64, 82-86, 96-99; RR6.SX10);

The impact caused the Highlander to travel backwards 200 feet and stop on the sidewalk (CR.220, 238; RR3.65.83); and the impact caused non-life-threating injuries to Loehr and life-threatening injuries to Parnell (CR.172-174, 204-209, 219-225, 240-241, 268, 293-308; RR3.17-18, 49-54, 64-70, 85-86, 113, 138-153).

The facts of the case prompted the State to seek and obtain an indictment against Rion for Manslaughter, which has only a mens rea of recklessness. Tex. Penal Code § 19.04 (2015). The jury found against the

State on the issue of recklessness by finding Rion "not guilty." Except for the complainants, who were similarly situated, these cases have the same facts. The facts were necessarily-decided against the State by the jury in the acquitted case as insufficient as a matter of law for Manslaughter under Tex. Penal Code § 19.04 (2015): (1) recklessly (2) caused the death of an individual (Parnell), and form these essential elements of Aggravated Assault with a deadly weapon: (1) intentionally, knowingly, or recklessly (2) causes bodily injury to another (Loehr) and (3) the person uses or exhibits a deadly weapon during the commission of the assault (Rion's vehicle). Aggravated Assault and Manslaughter share an essential element of reckless conduct. This element was necessarily decided against the State during the first trial.

Thus, what occurred in Rion's case is materially different than what occurred in *Adams*, in which this Court decided that when a defendant is acquitted on a defense-of-a-third-person theory after stabbing a person engaged in a fight, collateral estoppel does **not** bar a subsequent prosecution for stabbing another person who was **not** fighting. This is

not what happened in Rion's case—either factually or by any theory of collateral estoppel.

In the acquitted case for Manslaughter, the jury necessarily found against guilt on the mens rea of recklessness, which is the only mens rea for Manslaughter. *See* Tex. Penal Code § 19.04 (2015) ("a person commits Manslaughter if the person (1) **recklessly**…) and *Schroeder*, 123 S.W.3d at 399-401. One can commit Aggravated Assault intentionally, knowingly, or recklessly. Tex. Penal Code § 22.02(a)(2) (2015). One **cannot** commit Aggravated Assault with criminal negligence. *See also* Tex. Penal Code § 22.01(a)(1) (2015) ("…a person commits Assault if the person intentionally, knowingly, or recklessly causes bodily injury to another," and Aggravated Assault is merely Assault with an aggravating factor of the use of a deadly weapon or serious bodily injury).

Thus, if the State failed to prove in F15-71618 (acquitted-case) for Manslaughter that Rion acted recklessly, the fact that the evidence did **not** prove beyond a reasonable doubt that Rion acted recklessly is a relevant fact that was "necessarily decided" in the acquitted-case and this "necessarily decided" fact forms an essential element of the pending trial

for Aggravated Assault with a deadly weapon since the State must prove that Rion acted at least recklessly. If the State could **not** prove that Rion acted at recklessly in the acquitted case, the State **cannot** prove this in the pending case, so collateral estoppel prohibits trial of the pending case. And certainly, the State cannot **proceed** on the pending case on the theory that Rion acted recklessly.

No evidence was presented proving beyond a reasonable doubt that it was Rion's conscious objective or desire to cause the accident. *See* Tex. Penal Code § 6.03(a) (2015). **Nor** was there any evidence presented proving beyond a reasonable doubt that with respect to the nature what occurred and his conduct that Rion was aware of the nature of his conduct or that the circumstances exist, or with respect to a result of his conduct when he is aware that his conduct was reasonably certain to cause the result. *Id*.

As discussed above, the judgment of acquittal was based upon a general verdict. Collateral estoppel requires a court to examine the record of a prior proceeding, considering the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could

have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Ashe*, 397 U.S. at 444. This inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id*., *citing* *Sealfon* , 332 U.S. at 579.

Other than the record on appeal from the Manslaughter trial, the most relevant documents—the "other relevant matter"—are the affidavits for the arrest warrants. The affidavit for the pending case (F15-72104) alleges that on August 1, 2015 at about 5:35 p.m., Rion was driving a black 2014 Dodge Challenger, license-plate DSH2143, eastbound on the 5400 block of Arapaho in Dallas at a high speed. (CR.9-11, 71-73). Loehr was operating a tan 2006 Toyota Highlander westbound on the 5500 block of Arapaho. Loehr stopped in the left-turn lane at the red light that was displayed by the stop-and-go signal facing westbound at the intersection of Arapaho and Prestonwood. Rion failed to drive in a single lane and crossed over into the eastbound lane, causing the front of his Dodge to collide into the front of the Highlander. The impact caused the Highlander to travel backwards 200 feet across three lanes of traffic,

stopping on the sidewalk. (CR.71). Parnell was in the front passenger-seat of the Highlander. (CR.71). She was taken to Medical Center of Plano, where she passed away several days later. (CR.71).

Other than different complainants and charged-offenses of Manslaughter versus Aggravated Assault, the indictment (CR.74) and affidavit (CR.75-77) in F15-71618 (acquitted-case) describes the same facts as the indictment (CR.8) and affidavit CR.71-73) in F15-72104—this pending case. In the affidavit for this pending case, the witnesses are also Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Loehr is a lay witness. (CR.71-73). In the affidavit for F15-71618 (acquitted-case), the same witnesses are listed: Nathan Williams, James Ketelas, Oscar Garcia, Gregory Watkins, Floyd Burke, and Wendell Delaney, while Loehr is a lay witness. (CR.75-77).

Thus, other than a few minor differences, the affidavits for the two cases are identical. These same witnesses are listed in the *State's List of Potential Witnesses* filed in F15-71618 (CR.86-88).

Thus, when considering the entire record in the acquitted-case and

all evidence presented with the Application, this Court should affirm the Opinion and Judgment of the Court of Appeals and conclude that collateral estoppel prohibits the pending trial for Aggravated Assault since: (1) relevant facts—including that Rion did **not** act recklessly—were "necessarily decided" in the Manslaughter trial; and (2) the "necessarily decided" facts form the essential element of recklessness in the pending trial for Aggravated Assault. Under collateral estoppel, this issue **cannot** again be litigated between the State and Rion, and a trial for Aggravated Assault should be prohibited. *Ashe*, 397 U.S. at 443-445; U.S. Const. Amend. V; U.S. Const. Amend. XIV; *Reynolds*, 4 S.W.3d at 19, 21; *Taylor*, 101 S.W.3d at 439-440; *Murphy*, 239 S.W.3d at 794; *Watkins*, 73 S.W.3d at 268-269; *Stevens*, 235 S.W.3d at 740). The prior verdict was grounded upon an issue that the defendant seeks to foreclose from litigation and not whether there is a possibility that some ultimate fact has been determined adversely to the State. *Lane*, 806 S.W.2d at 338; *Ladner*, 780 S.W.2d at 250.

That Rion asked both the State and trial court to consolidate the cases into one trial but was denied should weigh heavily in favor of a finding by this

Court that collateral estoppel prohibits a future trial for Aggravated Assault

Rion asked both the State and the trial court that the cases be consolidated and tried at the same time, but both refused. (CR.78-84). Trial counsel asked the State for one trial for both cases, but the State refused, responding that only one case would be tried and the other would be "held back." So, on October 21, 2016 and March 3, 2017, Rion filed pretrial motions to consolidate F15-71618 (acquitted-case) and F15-72104 (this case), arguing (CR.78-84):

- Rion was charged with Manslaughter under F15-71618 (acquitted-case) and Aggravated Assault under F15-72104 (this case). Both arose out of the same event and during the same time. The allegations are intrinsic to each other—they are the same facts. Assertions in both cases are the same, i.e., the alleged actus reas leading to the car-accident that caused injuries to both persons are the same.

- Rion is probation-eligible on both cases, so the punishment would **not** vary.

- On or about September 21, 2016, trial counsel asked the State to agree to try both cases in the same proceeding. The State informed that only one case would be tried before a jury and that the other case would be "held back." Trial counsel objected to this scheme.

- Judicial economy demands that the cases be tried in the same trial. There is **no** valid reason that the trial court cannot or should not hear both cases in the same trial.

- Trying the cases separately violates Rion's rights under the Due Process Clauses of the Fifth and Fourteenth Amendment and his rights against cruel and unusual punishment under the Eighth Amendment.

On March 3, 2018, a hearing was held on Rion's motion. (CR145-154; RR2.4-13). After hearing arguments, the trial court denied the motion. (CR.47, 85, 154; RR2.13).

This is opposite from what occurred in *Currier v. Virginia*, 138 S.Ct. 2144 (2018), where the parties **agreed** to a severance of the charges, the defendant was acquitted of the case that was tried, and then he unsuccessfully asserted double jeopardy for the untried case. *Id*. at 2155-2156. In *Currier*, police found a gunsafe that allegedly contained guns and cash, which was reported stolen by Garrison. *Id*. at 2148. Most of the cash was missing. Police were led to Garrison's nephew, who confessed and implicated Currier. *Id*. A neighbor saw Currier leave Garrison's home around the time of the crime. *Id*.

Currier was indicted for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon. *Id*. Because the government was allowed to introduce evidence of his priors to prove the felon-in-possession charge, Currier and the government agreed to a severance

and asked the court to try the burglary and larceny charges first, and then the felon-in-possession charge in a second trial. *Id*. At trial, the government presented the testimony of the nephew and neighbor. *Id*. The jury acquitted Currier. *Id*.

Before the trial for the felon-in-possession charge, Currier filed a motion arguing double jeopardy and collateral estoppel, asking the trial court to forbid the government from relitigating issues resolved in his favor during the first, namely evidence about the burglary and larceny. *Id*. at 2148-2149. The motions were denied. The jury convicted Currier for felon-in-possession. *Id*. at 2149. The Virginia appellate courts affirmed, and Currier sought review in the Supreme Court of the United States ("SCOTUS"). *Id*.

The SCOTUS held that a defendant who moves for or agrees to a severance of charges may **not** successfully argue that a second trial violates double jeopardy, and by extension, collateral estoppel. *Id*. at 2155-2156. So logically, if a defendant—like Rion—moves for consolidation of charges into one trial but both the State and trial court refuse, the defendant is found **not** guilty, and: (1) relevant facts were

"necessarily decided" in first proceeding; and (2) those "necessarily decided" facts form an essential element of the accusation in the pending trial, then collateral estoppel **must** apply. Otherwise, the State can "game the system" as the State tries here by informing trial counsel that the pending Aggravated Assault case would be "held back." This violates the Double Jeopardy Clause of the Fifth Amendment and Rion's rights under the Fourteenth Amendment.

Rion's case is like the result in *Ashe*, where the government tried the defendant of robbing one of six persons, lost, and a second prosecution was held to violate the Double Jeopardy Clause. *Id*. In *Ashe*, because the first jury necessarily found that the defendant "was not one of the robbers," a second jury could not "rationally" convict the defendant of robbing the second victim without calling into question the earlier acquittal. *Ashe*, *id.* at 444-445. As the SCOTUS concluded:

> Straightforward application of the federal rule to the present case can lead to but one conclusion. For the record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that Knight had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not. The federal rule of

> law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible.

Id. at 445. In Rion's first trial for Manslaughter, the "...single rationally conceivable issue in dispute before the jury was whether" Rion acted recklessly, and the jury by its verdict found that he had **not**.

Unlike the defendant in *Ashe* and Rion, Currier **consented** to trying the cases separately and thus the second trial. The Double Jeopardy Clause concerns more than efficiency: it balances vital interests against abusive prosecutorial practices with consideration to the public's safety. *Currier*, *id*. at 2156. Had Rion **insisted** on severance, then *Currier* may allow the State its desired second shot at Rion for the pending case even though Rion was acquitted of Manslaughter in the acquitted-case (F15-71618). However, Rion did **not**. It was **the State** that insisted on two trials as the State wanted to "(hold) back" the pending case (F15-72104). In other words, the State used the Manslaughter trial as a "dry run" for the Aggravated Assault trial. The State lost the Manslaughter trial, and now wants a "second shot" at Rion. The State's scheme is what collateral estoppel is designed to prevent.

Waters applies only to cases where the first proceeding during which relevant facts were "necessarily decided" had a lower burden of proof for the State

In *State v. Waters*, 560 S.W.3d 651 (Tex.Crim.App. 2018), this Court overruled *Ex parte Tarver*, 725 S.W.2d 195 (Tex.Crim.App. 1986), which held that if the State seeks to revoke a defendant's community supervision based on an alleged offense that is later charged in an information or indictment, and the trial court at the revocation-hearing finds the allegation to be "not true," the collateral estoppel applies and the State is precluded from later prosecuting the defendant for that same alleged offense. *Id*. at 198-200.

In *Waters*, while on community supervision, Waters was arrested for DWI. *Waters*, 560 S.W.3d at 654. The State filed a motion to revoke the community supervision, alleging that she violated the terms by committing the DWI. *Id*. At the hearing, the State's sole evidence through the testimony of a community supervision officer was that Waters committed DWI. *Id*. The officer knew that Waters had been arrested for DWI but had **no** personal knowledge of the facts of the alleged DWI. *Id*. The trial court found that the State failed to prove by a preponderance

that Waters committed DWI as alleged in the motion and found the allegation "not true." *Id*.

The State then filed an information charging Waters with the same DWI that was alleged in the motion to revoke. *Id*. Waters filed a pretrial application for a writ of habeas corpus, arguing that the prosecution for the DWI was barred by collateral estoppel per *Tarver*. *Id*. at 654-655. The trial court granted the application and dismissed the information. *Id*. Per *Tarver*, the court of appeals affirmed. *State v. Waters*, No. 02-16-00274-CR, 2017 Tex.App.-LEXIS 6195, *5-6 (Tex.App.-Fort Worth, July 7, 2016) (mem. op.).

This Court reversed, holding that collateral estoppel is inapplicable following a "not true" finding at a revocation hearing. *Waters*, 560 S.W.3d at 657-658. The ruling was based on the procedural background of where a "not true" finding for a new offense at a revocation hearing is followed by a prosecution for that new offense, and distinguished *Ashe* and collateral estoppel situations where the State subjects a defendant to criminal prosecution then follows with a second-shot at prosecution under circumstances that would have required relitigation of the same

facts already found in his favor in the first trial (*Id.* at 659):

> "*Ashe* is distinguishable because, in that case, Ashe was subjected to criminal prosecution for an offense, followed by a second attempt at prosecution under circumstances that would have required relitigation of the same facts already found in his favor in the first trial. *Ashe*, 397 U.S. at 445-46. By contrast, the instant situation involves a revocation hearing followed by a first attempt at criminal prosecution, rather than successive criminal prosecutions involving the same facts. This distinction is critical because, unlike the initial proceeding in Ashe, in a revocation proceeding, the defendant is not on trial for the newly alleged offense. Rather, in a revocation proceeding, the central question is whether the probationer has violated the terms of her community supervision and whether she remains a good candidate for supervision, rather than being one of guilt or innocence of the new offense. Moreover, because guilt or innocence is not the central issue at a revocation hearing, a defendant does not face punishment for the newly alleged offense in that proceeding."

As this Court explained, in *Ashe* the SCOTUS held that collateral estoppel is a component of the double jeopardy clause, and when an issue of ultimate fact has been determined by a valid and final judgment, that issue **cannot** again be litigated between the same parties in a future proceeding. *Id.* at 656. And where a previous judgment of acquittal was based upon a general verdict, a court must examine the record of a prior proceeding considering the pleadings, evidence, charge, and other

relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. *Id*. at 658-659.

Tarver and *Waters* deal with a revocation hearing followed by a first attempt at criminal prosecution **rather than successive criminal prosecutions involving the same facts**, so in the "second shot," the defendant is **not** on trial for the new alleged offense. Because there is **no** possibility of a new conviction and punishment arising from a revocation hearing, jeopardy does **not** attach for an offense that is alleged as a violation of community supervision in a revocation hearing, and double jeopardy protections are inapplicable.

Waters does not affect Rion's case. This Court did **not** overrule collateral estoppel under the Double Jeopardy Clause under *Ashe* and its progeny. Unlike *Tarver* and *Waters*, Rion's case does **not** involve a finding of "not true" of a new alleged crime at a revocation hearing followed by a subsequent prosecution for that new alleged crime.

Other arguments supporting Rion's assertions

Collateral estoppel applies where the burdens of proof on a

necessary question of fact—that form an essential element of both charges—are the same. In *Dowling v. United States*, 493 U.S. 342, 348-349 (1990), the SCOTUS held that a prior "acquittal" does **not** prevent the government from relitigating a question of fact when the issue is governed by a lower standard of proof in a subsequent proceeding. Thus, as the Fifth Circuit discussed in *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997), a subsequent prosecution will be completely barred if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution. Further, per *Dowling*, collateral estoppel bars the introduction of evidence in a subsequent proceeding only if the facts "necessarily decided" in the first trial were determined under the same burden of proof applicable in the subsequent trial. *Id.* at 1401 fn9. A general verdict of acquittal "necessarily determines" that the evidence was insufficient to prove each element of the offense beyond a reasonable doubt, so collateral estoppel bars relitigation of facts that must be proven beyond a reasonable doubt. *Id.*

This is what occurred here. The general verdict of acquittal in the Manslaughter case "necessarily determined" that the evidence was

insufficient to prove an essential element of Aggravated Assault—recklessness—so collateral estoppel bars relitigation of the facts pertaining to recklessness.

In *Davis v. Commonwealth*, 754 S.E.2d 533 (Va.App. 2014), Davis was charged with shooting into an occupied vehicle, first-degree murder, use of a firearm during the murder, and **reckless** handling of a firearm. *Id.* at 535 (emphasis supplied). A passenger of the car was killed. *Id.* At the conclusion of a preliminary hearing, the trial court dismissed the misdemeanor reckless handling of a firearm charge for lack of evidence—effectively an acquittal—and the felonies were **not** certified because the state failed to prove that it was Davis who fired the weapon. *Id.* The state obtained indictments against Davis for the felonies. *Id.* Davis filed a motion to dismiss based on collateral estoppel, which was denied. *Id.* Davis was convicted of the felonies. *Id.*

Based on *Ashe* and its progeny, the appellate court reversed the trial court and ordered that the indictments be dismissed. The court found that the only rational conclusion that could be drawn is that the acquittal for the reckless charge was based on the state's failure to prove

that Davis was the criminal agent, which is an essential element of the felonies. *Id*. at 538. The appellate court considered the record of the prior proceeding, "taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational [trier of fact] could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id*. The appellate court did so and found that because the trial court found that Davis did **not** fire the firearm, he could not have handled it or been reckless with it. Thus, the verdict in the misdemeanor trial was grounded on the very issue that Davis sought to preclude from reconsideration in the subsequent murder trial—whether Davis was the gunman. *Id*. at 539. Consequently, the state was precluded from relitigating this fact in the subsequent prosecutions. *Id*.

The Virginia court made an interesting observation: "[I]t is well established that the choice of offenses for which a criminal defendant will be charged is within the discretion of the (state). Indeed, the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion." *Id*. The court observed that this

discretion "must be exercised with the thoroughness and preparation reasonably necessary for the representation of his client, the (state). *Id*. Doing so requires "inquiry into and analysis of the factual and legal elements of the problem" and "illustrates the need for the (state) to assess the evidence carefully and exercise selective discretion in the prosecution of multiple offenses arising from the same transaction." *Id*. at 539-540.

The rationale behind this observation by the Virginia court should be applied to Rion's case. Rather than "...assess the evidence carefully and exercise selective discretion in the prosecution of multiple offenses arising from the same transaction," the State opted to try only the Manslaughter case and informed trial counsel that the Aggravated Assault case would be "held back," to which trial counsel objected. The State here exercised its "discretion" by prosecuting only the Manslaughter charge, lost because the evidence was woefully insufficient as the jury verdict showed, and now the State wants its "second shot" at Rion. The evidence was so insufficient that the jury also rejected Criminally Negligent Homicide as a lesser-included offense. (CR-Supp.10). This Court should **not** allow such gamesmanship.

In *United States v. Dixon*, 509 U.S. 688 (1993), the SCOTUS reaffirmed that collateral estoppel bars a later prosecution for a separate offense if the government lost an earlier prosecution involving the same facts. *Id*. at 704-705. This does **not** mean that the government must try the cases together, as it is free to try them separately and win convictions in both. *Id*. But if the government tries them separately and they contain an element present in the other, they are the same offense for double-jeopardy purposes and successive prosecution is barred. *Id*. at 708-712.

In *United States v. Castillo-Basa*, 483 F.3d 890 (9th Cir. 2007), the court find that because the defendant was acquitted on illegal reentry charges under 8 U.S.C. § 1326, the jury found that a deportation hearing had **not** been held and that the defendant's testimony that he **never** appeared before an immigration judge was **not** false. Thus, the Double Jeopardy Clause through collateral estoppel barred the government for trying the defendant for perjury under 18 U.S.C. § 1621. Notably, the court found that collateral estoppel does **not** require that an issue be "fully and fairly" litigated to the maximum extent possible, but only that it be "litigated." *Id*. at 898, *citing* *Harris v. Washington*, 404 U.S. 55, 56-

57 (1971), which reversed a state court's ruling that a second trial was permissible—despite collateral estoppel—because a material issue had not been "fully litigated" after the trial court excluded important inculpatory evidence. The court also pointed out that that the "government's failure (for failing to present all evidence it had during the first trial) does **not** justify making an exception to the Double Jeopardy Clause." *Id*. at 898.

In *Yeager v. United States*, 557 U.S. 110, 122-123 (2009), the SCOTUS held that consideration of hung counts has no place in the collateral estoppel analysis. To identify what a jury "necessarily determined" at trial, "courts must scrutinize a jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." And, "even if the verdict is based upon an egregiously erroneous foundation...its finality is unassailable." *Id*. at 122. Thus, if the possession of insider information was a critical issue of ultimate fact in the charges against the defendant, "a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any

charge for which that is an essential element." *Id*. at 123.

Here, in the Manslaughter trial, whether Rion acted recklessly clearly "...was a critical issue of ultimate fact in the charges against the defendant." Rion was acquitted. Thus, "a jury verdict that necessarily decided (the issue of recklessness) in (Rion's) favor protects him from prosecution for any charge for which that is an essential element." Recklessness is an essential element of Aggravated Assault, so the State cannot be permitted its desired "second shot" at Rion and prosecute him for Aggravated Assault.

In *State v. Parsons*, 374 S.E.2d 123, 124 (N.C.App. 1988), the court observed similarly to how the Court of Appeals here found that collateral estoppel precludes previously litigated issues of fact or law. In *Parsons*, the state alleged in an indictment that the defendant committed manslaughter because he was speeding on the wrong side of the road and had an elevated BAC when he caused an accident that led to a stillborn baby girl. *Id*. at 126. The indictment was dismissed with prejudice since manslaughter required the killing of a living human. *Id*. The state later issued a new indictment again alleging manslaughter, asserting that the

defendant killed a human—the baby—who was "a viable but unborn female child." *Id*. at 123. The court dismissed the new indictment because factual issues were necessarily decided in the first proceeding that form an essential element of the charge in the second proceeding. *Id*. at 126.

Finally, in an unpublished case, *Acuña v. State*, No. 13-13-00633-CR, 2016 Tex.App.-LEXIS 1898 (Tex.App.-Corpus Christi Feb. 25, 2016) (not designated for publication), the defendant was acquitted of Murder, but the State later moved to try the defendant for Conspiracy to commit the same murder. *Id*. at *1. The court of appeals held that double jeopardy and collateral estoppel precluded a conviction for conspiring to commit the same murder because the first jury necessarily decided—under the law of parties—that the defendant did not with the requisite intent encourage, direct, aid, or attempt to aid others by engaging in the specified acts and thus necessarily decided that defendant did not act "in pursuance of" an agreement to murder the victim, as required for conspiracy. *Id*. at *23-35.

Rion's case is like *Acuña* because the issue in both is whether: (1) relevant facts were "necessarily decided" in the first trial (acquitted-case)

(Murder in *Acuña* and Manslaughter here); and (2) such "necessarily decided" facts form an essential element of the pending trial for (Conspiracy to commit the same murder in *Acuña* and Aggravated Assault with here). It is **not** relevant in *Acuña* whether Murder and Conspiracy to commit Murder were similar under the *Blockburger* test. *See* *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not). Manslaughter and Aggravated Assault are **not** considered the "same" because "each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. Likewise, Conspiracy to commit Murder contains in fact two elements **not** contained in Murder. Murder under Tex. Penal Code § 19.02(b) (2018) requires the State to prove that the defendant (1) intentionally or knowingly (2) causes the death of an individual. However, Conspiracy to commit a Murder (or any crime) under Tex. Penal Code § 15.02(a) (2018) requires (1) intent that a felony be committed with (2) an agreement with

at least one other person that they or one or more of them engage in conduct that would constitute the offense and (3) he or one or more of them performs an overt act in pursuance of the agreement. Thus, these are not the "same" under the *Blockburger* test.

Thus, collateral estoppel applied in *Acuña*, which held that under *Ashe*, 397 U.S. at 445, "We believe Acuña has met her burden to establish that one of the essential elements of the conspiracy charge had been previously 'necessarily decided; in her favor by a valid and final judgment…Accordingly, the trial court erred in denying her special plea insofar as it alleged that her conspiracy prosecution was barred by... collateral estoppel... *Id.* at *35. The court of appeals sustained Acuña's collateral estoppel claim, and this Court should affirm the Opinion below.

X. Conclusion

The Court of Appeals was correct by holding that the trial court abused its discretion by denying the Application on the issue of whether the State may try Rion for Aggravated Assault under a theory of recklessness because it is subject to collateral estoppel. The State is barred by double jeopardy from relitigating it in a future trial because:

(1) relevant facts—including that Rion did **not** act recklessly—were "necessarily decided" in the Manslaughter trial; and (2) the "necessarily decided" facts form the essential element of recklessness in the pending trial for Aggravated Assault. Rion prays that the Court affirm the Opinion and Judgment of the Court of Appeals.

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XI. Certificate of Service

I certify that on April 19, 2020, this document was served by efile on the Dallas County District Attorney to DCDAAppeals@dallascounty.org and joshua.vanderslice@dallascounty.org, and on the State Prosecuting Attorney to stacey.soule@spa.texas.gov, john.messinger@spa.texas.gov, and information@spa.texas.gov. *See* Tex. Rule App. Proc. 9.5 (2020) and Tex. Rule App. Proc. 68.11 (2020).

/s/ Michael Mowla
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